

1 THE HONORABLE ROBERT S. LASNIK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 BRUCE KEITHLY, DONOVAN LEE, and
10 EDITH ANNA CRAMER, Individually and on
Behalf of all Other Similarly Situated,

11 Plaintiffs,

12 v.

13 INTELIOUS, INC., A Delaware Corporation;
14 and INTELIOUS SALES, LLC, A Nevada
15 Limited Liability Company,

16 Defendants.

17 No. C09-1485 RSL

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR (1)
TEMPORARY STAY OF DISCOVERY
AND (2) CONDITIONAL REQUEST
FOR BIFURCATION OF DISCOVERY

18 **I. INTRODUCTION AND RELIEF REQUESTED**

19 Plaintiffs submit this memorandum in opposition to Defendants Intelius Inc. and Intelius
20 Sales Company LLC's (collectively "Intelius" or "Defendant") motion for (1) temporary stay of
21 discovery and (2) conditional request for bifurcation of discovery. *See* Dkt. #45. Defendant had
22 ample opportunity to request a stay from Plaintiffs and from the Court in the parties' Joint Status
23 Report submitted to the Court on March 16, 2010. *See* Dkt. #37. Nevertheless, Defendant did
24 not make such a request. Coupled with the fact that the Court has already issued a scheduling
25 order in which firm deadlines have been set with respect to trial dates and when Plaintiffs'
motion for class certification is due, Defendant's attempt to now argue that a stay is warranted is

1 completely unjustifiable. Plaintiffs would be prejudiced under the scheduling order to agree to
 2 an open-ended stay.

3 Relatedly, Defendant's request for conditional bifurcation is equally without merit.
 4 Bifurcating discovery will result in significant delays and additional expenses without providing
 5 any legitimate benefits to the parties. Defendant indisputably has the burden in showing that
 6 modifying discovery is necessary in this case, and it falls woefully short in meeting this burden.

7 For these reasons, as set forth in further detail below, Defendant's motion for a temporary
 8 stay of discovery and conditional bifurcation of discovery should be denied.

9 II. ARGUMENT

10 A. A Temporary Stay is Unwarranted Where No Such Request was Made in the 11 Parties' Joint Status Report and Where the Court Has Already Issued a Scheduling 12 Order.

13 Defendant suggests that a temporary stay is justified because the parties agreed in their
 14 Joint Status Report ("JSR") that the parties agreed to defer discovery until after the Court rules
 15 on Defendant's pending Motion to Dismiss. However, Defendant's argument reflects a gross
 16 mischaracterization of the parties' JSR, as nothing in the JSR indicates that the parties' agreed to
 17 defer *all* discovery while Defendant's motion is pending. Instead, the JSR clearly provides: "In
 18 the interest of both judicial economy and expense to the parties, *the parties propose deferring*
 19 *class discovery and setting the class certification schedule after the motion to dismiss is*
 20 *adjudicated.*" (Dkt. #37 at 5) (emphasis added). As made clear by any plain reading of this
 21 sentence, nothing suggests that Plaintiffs ever agreed that *all* discovery should be stayed pending
 22 the Court's ruling on Defendant's motion. Indeed, it is both revealing and telling that Defendant
 23 omits the second half of this sentence from their motion to somehow suggest that *all* discovery
 24 should temporarily be stayed. Plaintiffs never agreed to defer all discovery. Plaintiffs would
 25 like to review documents already produced in a related case in the Central District of California
 26 and to the Washington Attorney General's office pursuant to an investigation for the very same
 post-marketing transactions at issue in this case.

1 Furthermore, Defendant views the JSR as if it were an order from the Court. This
 2 paragraph is merely a proposal submitted by the parties for the Court's consideration. The Court
 3 considered this pleading, and subsequently issued a scheduling order setting the trial date and
 4 related dates. *See* Dkt. #44. Nowhere in this scheduling order did the Court enter a stay while
 5 any motion was pending before the Court. Moreover, the JSR was filed *after* the Defendant's
 6 Motion to Dismiss was fully briefed. As a result, the Court clearly had an understanding of the
 7 various pleadings before it and issued a scheduling order accordingly. Defendant cannot attempt
 8 to argue that the parties' JSR—which has been interpreted by the Court—is somehow binding on
 9 the parties.

10 In any event, Defendant fails to justify why the Court should depart from the scheduling
 11 order it has already issued in this case. Rule 16(b) governs the inquiry into whether a scheduling
 12 order may be modified. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th
 13 Cir. 1992) (“Once the district court had filed a pretrial scheduling order pursuant to Federal Rule
 14 of Civil Procedure 16 which established a timetable for amending pleadings, that rule's standards
 15 controlled.”). The rule specifically provides, in part, that a scheduling order “may be modified
 16 only for good cause and with the judge's consent.” Fed. R. Civ. P. 16(b)(4). The good cause
 17 standard in Rule 16(b)(4) “primarily considers the diligence of the party seeking the
 18 amendment.” *See Schultz v. Wal-Mart Stores, Inc.*, 68 Fed. Appx. 130, 132 (9th Cir. 2003).
 19 “[T]he focus of the inquiry is upon the moving party's reasons for seeking modification ... If that
 20 party was not diligent, the inquiry should end.” *Id.*; *see also* Advisory Committee Note to 1983
 21 Amendment to FRCP 16(b)(4) (indicating that good cause to modify a scheduling order is
 22 present if a deadline “cannot reasonably be met despite the diligence of the party seeking the
 23 extension”).

24 Here, Defendant wholly fails to show good cause for modifying the scheduling order, and
 25 fails to explain why it would suffer prejudice from producing the discovery Plaintiffs seek.
 26 Indeed, Defendant's entire argument with respect to a temporary stay is limited to approximately

1 one page, *see* Dkt. #45 at 8-9, and Defendant unilaterally contends that because some courts have
 2 stayed discovery while a dispositive motion is pending, this Court should somehow do the same.
 3 However, this conclusory argument finds no support from the facts and circumstances of this
 4 case. Specifically, and as set forth in further detail below in response to Defendant's request for
 5 conditional bifurcation, Defendant has already begun producing discovery in a related case in the
 6 Central District of California and to the Washington Attorney General's office pursuant to an
 7 investigation for the very same post-marketing transactions at issue in this case. In the civil
 8 litigation, Defendant's motion for a temporary stay was denied. *See Baxter v. Intelius Inc., et al.*,
 9 Case No. 09-01031-AG-MLG (C.D. Cal.) (Dkt. #70). Additionally, Defendant acknowledges
 10 that it has already produced discovery in a formal investigation by the Washington State
 11 Attorney General's office. *See* Compl., ¶ 28 in *Bebbington v. Intelius, Inc. et al.*, Case No. C10-
 12 500 RAJ (W.D. Wash). There is no justifiable reason pursuant to Rule 16 why Plaintiffs in this
 13 case should not be afforded the same level of discovery, as it would be no burden to Defendant
 14 to produce discovery already produced in other civil and governmental actions.

15 In addition, Defendant had ample opportunity during the parties' Rule 26(f) conference
 16 and in the Rule 26(f) Report to ask Plaintiffs and the Court for a temporary stay on issues related
 17 to discovery. However, no such request was made during that time. During the parties Rule 37
 18 discovery conference on April 23, 2010, Plaintiffs' counsel asked Intelius's counsel why they
 19 had not requested a stay either from Plaintiffs or from the Court when drafting the JSR, which
 20 would have been an obvious time to make such a request. Intelius's counsel had no reason, other
 21 than stating that it was not "strategic." *See* Griffin Decl. at ¶ 2. Plaintiffs' counsel can only
 22 speculate that it was exactly strategic because defense counsel had filed a request to send the
 23 California case to Washington through the Multi-District Litigation Panel, and, prior to the
 24 denial of that request, sought to advance the Washington litigation. Respectfully, Plaintiffs ask
 25 the Court not to condone this gamesmanship. Plaintiffs also ask for the opportunity to prove
 26 liability in this case by allowing discovery to go forward within the established scheduling order.

1 Plaintiffs can only speculate that Defendants' about-face on producing discovery must be the
 2 result of possessing highly incriminating documents to which Plaintiffs are entitled.

3 Accordingly, Defendant's request for a temporary stay is unwarranted, and the Court
 4 should direct Defendant to proceed with discovery in a manner consistent with the Court's well-
 5 considered scheduling order.

6 **B. Intelius's Request for Bifurcated Discovery Will Result in Delays and Additional
 7 Expense for the Parties without Providing Any Legitimate Benefits and Should
 Therefore be Denied.**

8 Under the Federal Rules, parties are permitted to begin discovery, using the methods and
 9 timing of their own choosing, as soon as they have conferred under Rule 26(f). Rule 26(d) gives
 10 the Court the discretion to sequence discovery, but only where the Court determines that a
 11 particular sequence will both accommodate the parties' convenience and further the interests of
 12 justice. *See Fed. R. Civ. P. 26(d).* This rule, additionally, must be construed to secure the just,
 13 speedy and inexpensive determination of the action. *See Fed. R. Civ. P. 1.*

14 The question of bifurcation was presented in the JSR submitted by the parties on March
 15 16, 2010. In that report, the parties set forth their differing views about the sequencing of
 16 discovery. Plaintiffs asked the Court to allow approximately 13 months for all discovery with no
 17 limits or distinctions between class and merits discovery. Meanwhile, Defendant asked the
 18 Court to bifurcate discovery into two phases: class, followed by merits. (Dkt # 37, Status Report
 19 at 8-9.) The Court considered the parties' views and ordered discovery to proceed without
 20 substantive restrictions, setting one deadline, July 10, 2011, as the end of the discovery period.
 21 (Dkt # 44, Minute Order Setting Trial Date and Related Dates at 1-2.) Thus, Defendant's request
 22 is in reality a motion for reconsideration. Under Local Rule CR 7(h)(1), it should be denied as,
 23 again, Defendants have not shown any manifest error or a new showing of fact or law that could
 24 not be brought to the Court's attention in the JSR.

25 In the event the Court chooses to consider the bifurcation request as a new motion, it still
 26 should be denied. In the present case, class and merits discovery should proceed concurrently.

1 As noted by the Advisory Committee to the Federal Rules of Civil Procedure, courts should not
 2 “forc[e] an artificial and ultimately wasteful division between ‘certification discovery’ and
 3 ‘merits discovery.’” See Fed. R. Civ. P. Rule 23 advisory committee’s note. Given the
 4 significant overlap between class and merits evidence, bifurcated discovery will only create
 5 inefficiencies, cause delay, and require otherwise unnecessary Court intervention – all while
 6 prejudicing Plaintiffs.

7 **1. Intelius Fails To Carry Its Burden in Requesting a Departure from the Rules**
 8 **of Civil Procedure and the Court’s Scheduling Order.**

9 “The party who resists discovery has the burden to show discovery should not be
 10 allowed, and has the burden of clarifying, explaining, and supporting its objections.”
 11 *Cunningham v. Bank One*, No. 05-210, 2006 WL 3361773 at *1 (W.D. Wash. Nov. 20, 2006)
 12 (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). Thus, Intelius bears the
 13 burden of demonstrating that its request will serve the convenience of the parties *and* further the
 14 interests of justice – which include the public interest and judicial economy, as well as the just,
 15 speedy and inexpensive determination of the action.

16 **a. Intelius Makes No Showing of Inconvenience that Would Warrant**
 17 **Bifurcation.**

18 Defendant asks this Court to defer merits discovery because “Intelius estimates that
 19 Plaintiffs’ request [for production of documents] covers tens of thousands of documents.” (Dkt #
 20 45, Def. Mot. at 2.) Defendant makes no evidentiary showing that it will face significant costs in
 21 producing discovery or that the cost of producing merits discovery will be significantly greater
 22 than the cost of producing class discovery. Defendant has failed, moreover, to explain what
 23 significant costs would attach to providing Plaintiffs with a copy of the materials already
 24 produced in *Baxter v. Intelius Inc., et al.*, Case No. 09-01031-AG-RSM (C.D. Cal.) (where
 25 discovery is underway), and produced to the Washington Attorney General (who is conducting a
 26 formal investigation against Intelius and has already deposed Intelius executives). Intelius
 cannot plausibly claim that the scope of discovery sought by Plaintiffs is materially greater than

1 the discovery sought in the *Baxter* case or the Washington Attorney General's investigation. In
 2 asking the Judicial Panel on Multidistrict Litigation to consolidate *Keithly* and *Baxter*, Intelius
 3 asserted that the cases raise "identical questions arising from complex facts regarding
 4 Defendants' conduct" over "nearly identical class periods." (Dkt# 13-5, Br. ISO Intelius Inc.'s
 5 Mot. For Transfer of Actions Pursuant to 28 U.S.C. § 1407 at 2.) Similarly, in a recent SEC
 6 filing, Intelius described the Washington Attorney General's investigation as relating to "third-
 7 party subscription services advertised on our websites and our own Identity Protect subscription
 8 services"¹ – the same practices and products presented in the complaint in this action. The fact
 9 that Intelius has produced merits discovery in other actions undermines its request to defer merits
 10 discovery in this action.

11 Even if Intelius were not currently under obligation to produce materials in other
 12 proceedings, it is difficult to believe that bifurcated discovery would, in practice, save time and
 13 money here. Rather, it is reasonable to assume that the costs of producing class discovery will
 14 subsume the costs of producing merits discovery because all potentially responsive materials will
 15 have to be collected by Intelius and reviewed by defense counsel to determine whether they bear
 16 on class, class and merits, or merits exclusively. *In re Rail Freight Fuel Surcharge Antitrust*
 17 *Litig.*, 258 F.R.D. 167, 174 (D.D.C. 2009). In response to Defendant's claim that "it would be
 18 simple, in practice, to isolate the items relevant to class certification and the items that would be
 19 relevant to the merits of the case[,"] one court expressed skepticism:

20 [T]he creation of means to search large databases is a work in
 21 progress and no one has suggested how the search of defendants'
 22 data could be refined so that a search engine of some sort could
 23 yield ESI that pertained to [class] impact but not ESI pertaining to
 24 any thing else. While defendants blithely suggest that the lawyers
 in this case are skilled at searching and can therefore find what
 they need, they do not propose exactly how the lawyers will use
 this claimed expertise and create a search engine so refined and

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 26 ¹ Intelius Inc., Registration Statement (Form S-1/A) at 25 (Oct. 19, 2009) available at
<http://www.sec.gov/Archives/edgar/data/1255691/000095012309051082/v52058a4sv1za.htm>. Intelius further
 disclosed that the Washington AG's investigation has included depositions of Intelius executives. *Id.*

1 exquisite that it will yield information bearing on the certification
 2 question but not the merits.

3 *Id.* at 173. While Rule 26(d) gives the Court the flexibility to relieve a party, temporarily, from
 4 discovery obligations where such relief would legitimately reduce a discovery burden, parties
 5 cannot reasonably expect to be relieved of all the burdens inherent in litigation under the Federal
 6 Rules.

7 **b. Intelius's Desultory Assertions Do Not Withstand Scrutiny.**

8 Defendant makes two additional arguments in support of its request. Even if these
 9 arguments were relevant under Rule 26(d) (which they are not), they are premised on faulty
 10 assumptions and thus cannot withstand scrutiny.

11 Defendant first argues that Plaintiffs will not be prejudiced by bifurcation because ample
 12 time, if used diligently, for phased discovery is provided under the Court's scheduling order.²
 13 Under Defendant's scenario, assuming that the Court decides the motion for class certification on
 14 the day noted on the motion calendar (February 11, 2011), which is not the practice in this
 15 district, Plaintiffs would have less than six months for merits – including expert – discovery.
 16 Intelius might be correct if all discovery occurred simultaneously, but serving all discovery at
 17 one time would eliminate the benefits of the various discovery methods contemplated by the
 18 Federal Rules. Litigants generally conduct discovery more efficiently, moving from the general
 19 to the specific, using particular discovery methods in sequence: document requests,
 20 interrogatories, depositions, and admissions. Expert discovery, moreover, cannot begin until
 21 significant fact discovery is complete. Assuming Defendant used all of the response time
 22 available under the Federal Rules, and responded fully to all discovery requests (obviating the
 23 need for any motions to compel), it would be virtually impossible for Plaintiffs to complete all

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² Dkt # 45, Def. Mot. at 11. Defendant insinuates that Plaintiffs have been dilatory in prosecuting their case, but this
 25 simply is not so. Upon receipt of the Court's first scheduling order (dated February 2, 2010), Plaintiffs wrote to
 26 Defendant to schedule a Rule 26(f) conference with Defendant on February 19, 2010. The conference took place
 on February 25, 2010. During the month of February, Plaintiffs were also drafting their opposition to Defendant's
 motion to dismiss. The parties' joint report was filed on March 16, 2010. Plaintiffs served requests for production
 of documents on March 26, 2010.

fact discovery in six months and mathematically impossible to complete all merits discovery (including expert discovery) in that time.

Defendant also argues that bifurcation is more efficient and economical because the Court will no longer have jurisdiction of the case if class certification is denied; thus, Intelius argues, the merits of Plaintiffs' claims will never be reached. (Dkt # 45, Def. Mot. at 12.) Defendant is mistaken. Last month, the Ninth Circuit held that 28 U.S.C. § 1332(d) vests original jurisdiction over class actions involving diverse parties if the amount in controversy exceeds \$5,000,000 at the time of filing in, or removal to, federal court. *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil*, No. 10-55269, 2010 WL 1571190, at *3-4 (9th Cir. Apr. 21, 2010). The Ninth Circuit explicitly held that "continued jurisdiction [under § 1332(d)] 'does not depend on certification' [of the putative class]" and that denial of a class certification motion would not divest a court of jurisdiction. *Id.* at 4. Thus, even if the Court concludes that this case is not suitable for class treatment, Plaintiffs' claims would remain in federal court. As such, merits discovery produced now will not be wasted.

2. Bifurcation Would Delay and Complicate the Litigation

Contrary to Defendant's assertions, no clear line divides class and merits discovery. This fact is underscored by instruction from the Ninth Circuit: trial courts must consider evidence going to the merits of a class's claims to ensure that all of the requirements of Rule 23 are met before certifying a class. *Dukes v. Wal-Mart*, No.04-16688, 2010 WL 1644259, at *5 (9th Cir. March 24, 2009).³ Thus, it is foreseeable, if not certain, that bifurcation will require the ongoing supervision of the Court to police discovery disputes. See *In re Rail Freight Fuel Surcharge*, 258 F.R.D. at 174 ("If bifurcated, this Court would likely have to resolve various needless disputes that would arise concerning the classification of each document as 'merits' or

³ In *Dukes*, the Ninth Circuit explained that in deciding a class certification motion, a court may only consider the merits to the extent necessary to ascertain compliance with Rule 23 and not to decide challenges "directed to stand-alone merits issues." *Id.* at *18.

1 ‘certification’ discovery.”) (citation omitted). As one district court explained in denying a
 2 motion to bifurcate discovery:

3 *Bifurcation would be inefficient, unfair, and duplicative* in this
 4 case for several reasons. First, *bifurcation would further delay* the
 5 resolution of the litigation in derogation of Rule 1 of the Federal
 6 Rules of Civil Procedure. . . . *Bifurcation would also belie*
 7 *principles of judicial economy*, as the Court may be forced to
 8 spend time and resources resolving discovery disputes over what is
 9 “merit” discovery as compared to “class” discovery. . . . Second,
 10 class certification discovery in this case is not “easily”
 11 differentiated from “merits” discovery. There will be a *substantial*
 12 *overlap* between what is needed to prove plaintiff’s price-fixing
 13 claims, as well as the information needed to establish class-wide
 14 defenses, and what is needed to determine whether the elements of
 15 class certification are met. . . . Due to the intermingling of the
 16 facts necessary to evaluate class certification and the merits of
 17 plaintiffs’ claims, separating the two would duplicate discovery
 18 efforts, which, in turn, would force both parties to incur
 19 *unnecessary expenses and would further protract the litigation.*

20 *In re Plastic Additives Antitrust Litig.*, No. 03-2038, 2004 WL 2743591, at *3-4 (E.D. Pa. Nov.
 21 29, 2004) (citations omitted) (emphasis added). For these reasons, many courts have concluded
 22 that concurrent discovery is the more prudent and efficient course in class actions.⁴

23 Intelius provides evidence of the types of discovery objections it will raise if discovery is
 24 bifurcated here. Intelius characterizes 20 of Plaintiffs’ 23 documents requests as “not relevant to
 25 certification.” (Dkt # 45, App. A.) These include categories of documents that show: (1)
 26 Intelius’s uniform course of conduct in dealing with its customers (RFP Nos. 3, 4, 5, 10, 11, 13,
 14, 22); (2) how class members were expected to and did respond to cues on the Intelius website
 1 (RFP Nos. 5, 9); (3) the number and types of customer complaints received by Intelius (R.F.P.
 2 No. 15); (4) class damages (R.F.P. No. 6); and (5) class member identities (R.F.P. 21). While

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1 these requests unquestionably relate to the merits of Plaintiffs' claims, documents produced in
 2 response to them will also be used to demonstrate the existence of common issues of law and
 3 fact and the predominance of common issues over individualized questions.⁵ Plaintiffs further
 4 request documents that explain Intelius's organizational structure (R.F.P. Nos. 12, 18) and
 5 document and data retention policies (R.F.P. No. 19). These requests go to neither class nor
 6 merits specifically; rather, they are the type of requests that enable discovery and are used to
 7 select deponents and determine the adequacy of a defendant's document production.

8 **3. Plaintiffs Will Be Prejudiced by Bifurcation.**

9 A bifurcated approach to discovery would substantially prejudice Plaintiffs by denying
 10 them access to materials necessary to prove the allegations of the complaint for some unspecified
 11 period of time. As the *Rail Freight Surcharge* court recently noted, "the continued need for
 12 supervision and the increased number of disputes would further delay the case proceedings,"
 13 causing prejudice to Plaintiffs. *In Re Rail Freight Surcharge*, 258 F.R.D. at 174; *see also In Re*
 14 *Plastic Additives*, 2004 WL 2743591 at *3. Moreover, valuable evidence, such as the testimony
 15 of witnesses, whose recollection will likely fade, and electronically-stored evidence, which can
 16 be deleted, may be lost. *See, e.g., Smith v. Hooey*, 393 U.S. 374, 380 (1969) (The "erosive effects
 17 of the passage of time" causes "evidence and witnesses [to] disappear, memories [to] fade, and
 18 events [to] lose their perspective."). These concerns, in addition to those identified previously,
 19 establish that Defendant's conditional request is unjustifiable given the facts and circumstances
 20 of this case.

21
 22
 23 **5** The very types of discovery Defendant objects to have been recognized as relevant to class certification by courts
 24 in the Ninth Circuit. *See, e.g., Yingling v. eBay, Inc.*, No. 09-01733; 2010 WL 373868, at 3-5 (N.D. Cal. Jan. 29,
 25 2010) (denying defendant's motion for protective order from discovery related to customer transaction data,
 26 customer complaints and internal company documents relating to eBay's "policies and procedures [for] reviewing,
 approving and publishing web-page related documents" used or reviewed by customers where defendant argued
 that plaintiff prematurely sought merits discovery in violation of bifurcated discovery schedule); *Ho v. Ernst &*
Young, LLP, No 05-04867 2007 WL 1394007, at *1-2 (N.D. Cal. May 9, 2007) (finding that time and activity
 records for employees denied overtime pay and a list of all putative class members were class-related discovery).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion for a temporary stay of discovery and conditional request for bifurcation of discovery.

DATED this 10th day of May, 2010.

By /s/ Mark A. Griffin

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2010, I caused to be served a true and correct copy of the PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR (1) TEMPORARY STAY OF DISCOVERY AND (2) CONDITIONAL REQUEST FOR BIFURCATION OF DISCOVERY on the following recipients via the method indicated:

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DATED this 10th day of May, 2010.

/s/ Mark A. Griffin
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